Based on the district court's disbelief of Maggiore, and at the urging of the judge, the prosecutors investigated whether any new facts or circumstances undermined the jury's verdict and the veracity of the cooperating witnesses (Second Circuit Appendix at A. 215).[3] After reviewing all the information resulting from the six-month investigation, the government confirmed that Maggiore "testified truthfully that Angel D'Angelo shot Thomas Palazzotto" (Second Circuit Appendix at A. 215-16). Therefore, the government reaffirmed its confidence in Maggiore's testimony about D'Angelo (Second Circuit Appendix at A. 216).

Nevertheless, even though the government was "confident about Maggiore's identification of D'Angelo as the shooter," which was the "core" of his testimony (Second Circuit Appendix at A. 229-30, 286), as a result of Judge Gleeson's interference in the plea process[4] the government withdrew its § 5K1.1 motion, based on a few allegedly false statements by Maggiore that the government concedes were "collateral" and "*not material*"

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[3] As part of the thorough investigation, Maggiore was subjected to a polygraph examination "conducted by experienced and certified FBI examiners" (Second Circuit Appendix at A. 215, 226-27).

[4] As an example of the kind of pressure exerted by Judge Gleeson, before the government withdrew Maggiore's § 5K1.1 letter the court directed the prosecutors to submit a letter explaining why he should not find that they *knowingly* presented perjured testimony during the *D'Angelo* trial! (Second Circuit Appendix at A. 231). The judge also declared to the government's attorneys, "I am shaking up here. I feel sick with this case. This case reeks" (Second Circuit Appendix at A. 261). The court added, "You demonstrated you can defend this, but you don't have to. I cannot for the life of me figure out why you are." *Id.* Later, Judge Gleeson *conceded* that "[t]hese defendants had quite an ally in the prosecutor" but then "I informed the government that I thought its witnesses were liars" (App. 21-22). He added, "I've been hard on the government" (App. 22).

(Second Circuit Government Appendix at GA. 26) (emphasis supplied).[5]

Thus, despite the fact that Maggiore's cooperation exceeded the government's expectations, jeopardized his personal safety, and resulted in nine convictions, in the end, the government agreed with Judge Gleeson that Edward Maggiore should be sentenced to a term of life imprisonment (Second Circuit Appendix at A. 242, 288).

Without holding a hearing, or ever providing the defense with a chance to contest the government's claims, and refusing to recuse himself, the district court then denied Petitioner's motion for specific performance of the cooperation agreement (App. 18).[6] Judge Gleeson then imposed a *life sentence* without parole on Edward Maggiore, who was only 29 years old at the time of

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[5] Even though Maggiore admitted that *he* popped open the hood of his car so that the gun D'Angelo used to shoot Palazzotto could be retrieved, the government suggested that Maggiore falsely testified that he did not remember whether it was he or Robert Alvarado who retrieved the gun that was eventually handed to D'Angelo. The government also indicated that Maggiore could not recall a telephone conversation that he may have had with Alvarado's brother before the shooting in which Albert Alvarado said "give 'em hell" (A. 87, 216). Significantly, the government recognized that the phrase "give him hell" is "not synonymous with shooting" (Second Circuit Special Appendix at SPA. 36-37).

[6] Judge Gleeson reasoned that he "would not depart on the ground of substantial assistance even if a motion were made" and, regardless, the government "acted in good faith" in refusing to comply with the agreement (App. 18).

the shooting.[7] The Second Circuit affirmed and denied rehearing (App. 1-6, 27-28).

[7] If Maggiore had been sentenced pursuant to the cooperation agreement, and received the downward departure for substantial cooperation, his sentence would have been in the range of 97 to 121 months (a period of 8 to 10 years).

REASONS FOR GRANTING CERTIORARI

1. THE SECOND CIRCUIT'S DECISION, WHICH ENABLES THE GOVERNMENT TO BREACH ITS COOPERATION AGREEMENT WITH A WITNESS WHO HAS PROVIDED SUBSTANTIAL ASSISTANCE AND PUT HIS LIFE ON THE LINE BASED SOLELY UPON ITS BELIEF THAT THE WITNESS MADE A FEW IMMATERIAL MISREPRESENTATIONS DURING HIS LENGTHY PERIOD OF COOPERATION, WILL SERIOUSLY IMPAIR THE WILLINGNESS OF COOPERATING WITNESSES TO WORK WITH THE GOVERNMENT AND GIVE TESTIMONY AT TRIAL.

"Informants are *the life blood of any law enforcement agency*" and the "use of informants remains one of law enforcement's oldest and most essential investigative tools."[8] Nevertheless, the Second Circuit's most harrowing decision in *Maggiore* — affirming the *life sentence* imposed on a cooperating witness based solely upon a tentative determination that the witness committed perjury as to *immaterial* matters — is bound to carry grave implications that extend far beyond the bounds of this highly publicized case.[9] This is, of course, because defendants who may wish to cooperate with a

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[8] Maria Limbert, *Problems Associated with Prosecutorial Control Over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Presentence Hearing*, 27 J. Legis. 251 (2001) (emphasis supplied).

[9] *See, e.g.*, "Men Who Cooperated in Gang Murder Case Sentenced to Prison," *Associated Press* (April 9, 2004).

government investigation, in exchange for a more lenient sentence, will be discouraged from doing so by the life sentence imposed upon Edward Maggiore.

Simply stated, the government entered into a *contractual arrangement* with Mr. Maggiore. He complied with that agreement by providing information that directly led to a number of important convictions for the U.S. Attorney's Office. He also put his life on the line. The government concedes that Maggiore's cooperation "*exceeded expectations*" (Second Circuit Appendix at A. 204) (emphasis supplied). And, to date, the government fully credits his testimony as "truthful" regarding the principal issue of his cooperation: whether Angel D'Angelo shot Thomas Palazzotto.

Despite this remarkable record of "substantial cooperation," which resulted in guilty pleas of nine violent gang members, the government broke its promise to advocate for a lenient sentence. Thus, after draining him dry as a source, they left Edward Maggiore to endure a life sentence based solely upon allegations that he failed to accurately recall certain "collateral" matters during his cooperation, which spanned more than two years. Condemned to spend the rest of his life in prison, and in mortal fear of the many violent defendants who were convicted through his cooperation, he has received absolutely nothing in exchange for his significant assistance. These stark uncontested facts suggest the awful solemnity of the occasion that brings us to this Court bearing a recurring issue of constitutional scale and extreme urgency.

This is a matter of universal concern since this decision is destined to seriously impair the willingness of cooperating witnesses to work with the government and give testimony at trial, which is so critical for the administration of justice. Defendants will not enter into cooperation agreements, and subject themselves to the terrible hardships and risks associated with such an undertaking if, after fulfilling their part of the bargain and providing substantial assistance, they are sentenced to *prison for the rest of their lives*, based on an *immaterial* breach of the agreement.[10]

This Court should resolve this significant debate in light of the dire consequences to cooperating witnesses across the country. Otherwise, this volatile issue, relating to the breach of a cooperation agreement for immaterial or unproven falsities, will be a source of continuing controversy across the full expanse of this nation. Once it becomes evident that the government can renege on a cooperating agreement based solely on an *immaterial* breach, the whole system of using cooperating witnesses will be jeopardized.

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[10] As recently confirmed by the Court of Appeals for the Federal Circuit, a party breaches a contract when it is in "material non-compliance with the terms of the contract." *Gilbert v. Department of Justice*, 334 F.3d 1065, 1071 (Fed. Cir. 2003). A breach is material when it "relates to a matter of vital importance, or goes to the essence of the contract." *Id.*

2. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATING TO WHETHER AN EVIDENTIARY HEARING IS WARRANTED TO INVESTIGATE THE GOVERNMENT'S REVERSAL OF A DECISION TO MAKE A § 5K1.1 MOTION.

The Second Circuit's decision, affirming the district court's refusal to conduct a hearing that would have enabled defense counsel to challenge the alleged breach, is also in direct conflict with established authority from the Court of Appeals for the Eighth Circuit. *See United States v. Pipes*, 125 F.3d 638, 641-42 (8th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998). *Pipes* holds that an evidentiary hearing is necessary where, as here, a cooperating witness provided information that contributed to the government's case and the prosecutor, in an "about-face," refused to make a promised § 5K1.1 motion. The court emphasized the inequities in denying a hearing where the government's proof, that the witness was "not completely correct and that he was not being altogether truthful," could not be confronted through the crucible of cross-examination. 125 F.3d at 641.

Prisoners who have sacrificed so much, yet are deprived of any relief, suffer a grievous wrong and should be entitled to a hearing to investigate allegations that they breached the cooperation agreement. This is especially true where a defendant has received such a severe sentence. The absence of full adversary testing of these constitutional claims cannot help but erode our confidence in the criminal justice system. *See also Wade v.*

United States, 504 U.S. 181, 185 (1992) (the government's discretion in refusing to file a § 5K1.1 motion is subject to constitutional limitations).

3. THE SECOND CIRCUIT'S DECISION, WHICH ENABLES FEDERAL JUDGES TO INTERFERE WITH THE PROSECUTION'S EXECUTIVE DECISION TO FULFILL ITS COMMITMENT TO A COOPERATING WITNESS, VIOLATES THE SEPARATION OF POWERS DOCTRINE AND CONFLICTS WITH RECENT AUTHORITY FROM THE SEVENTH CIRCUIT.

Review by this Court is also essential to maintain the indispensable balance of powers that exists between the judicial and executive branches of government relating to prosecutorial discretion. Pursuant to the strict mandates of § 5K1.1 and 18 U.S.C. § 3553(e), the government has the exclusive authority to decide whether to move for a downward departure based upon substantial cooperation. Nevertheless, by pressuring the government into reconsidering its decision, the district court specifically intruded into the government's discrete province and deprived Petitioner of due process.

And, since the panel's decision condones the district court's intrusion into the government's exercise of its prosecutorial discretion, it also conflicts with recent authority from the Seventh Circuit holding that "except with extraordinary justification a judge may not inquire why or how the United States Attorney decided to file a § 5K1.1 motion." *United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004). Finally, a district judge's

refusal to apply § 5K1.1 "deprives the Executive Branch of an inducement that can be used to solve old crimes and deter new ones." 384 F.3d at 870.

The Second Circuit's exceptional stance, which enables a judge to intimidate federal prosecutors into withdrawing § 5K1.1 motions, authorizes an impermissible intrusion into the prosecutorial function and fully warrants review by this Court.

Conclusion

For all the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the Second Circuit's opinion in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 7th day of March, two thousand and five.

PRESENT:

HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 04-2767

EDWARD MAGGIORE,

Defendant-Appellant.

For Appellee:

BARBARA D. UNDERWOOD, Assistant United States Attorney, *for* Roslynn Mauskopf, United States Attorney for the Eastern District of New York (Pamela K. Chen, Assistant United States Attorney, *on the brief*).

For Defendant-Appellant:

HERALD PRICE FAHRINGER, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, New York, NY (Gerald J. Dichiara, Law Office of Gerald J. DiChiara, and Erica T. Dubno, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP, *of counsel*).

Appeal from the United States District Court for the Eastern District of New York (Gleeson, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Edward Maggiore appeals from a judgment of the United States District Court for the Eastern District of New York (Gleeson, *J.*) on May 13, 2004. Based on his plea of guilty, Maggiore was convicted of murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1) and sentenced to life imprisonment. We assume that the parties are familiar with the facts, the procedural context, and the specification of the issues on appeal.

Maggiore alleges that the government acted in bad faith by withdrawing its motion pursuant to U.S.S.G. § 5K1.1. However, despite Maggiore's substantial

assistance to the government, the government had reason to do so. Maggiore's plea agreement expressly states that "[s]hould it be judged by the Office that the defendant has failed to cooperate fully, [or] has intentionally given false, misleading or incomplete information ... this Office will be released from its obligations under this agreement, including ... to file the [5K1] motion." The government conducted an extensive, six-month investigation as to Maggiore's compliance with his plea agreement, and concluded that he had lied concerning (at least) who took the gun out of the trunk and the role of Albert Alvarado in the killing. Here, "the explicit terms of [the] cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor," therefore "the prosecutor may reject the defendant's performance provided he or she is honestly dissatisfied." *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990).

Maggiore does not deny that there were breaches by him of the plea agreement, but he contends that the government's decision to act on those breaches was in bad faith. He argues, first, that the government acted at the direction of the district court, and, second, that the government's decision to withdraw his 5K1 letter while retaining it for another cooperating witness, Robert Alvarado, was done without a good faith justification. Both of these assertions are unavailing.

As to the first, the government did not simply act at the court's behest, but only after a full investigation. Additionally, the government maintained its position — in opposition to the court — that Angel D'Angelo was the shooter, and, as already stated, did not withdraw its 5K1 motion as to Robert Alvarado, notwithstanding the district court's expressed belief that he, too, was

lying. Second, despite Maggiore's claim of wrongful disparate treatment of him as compared to Robert Alvarado, the government has proffered justifications for its decisions, and there is no reason to think that these justifications were not what motivated the government. The contrast between Maggiore's reactions when faced with his lies and the reaction of Robert Alvarado, by itself, supported different treatment of the two. *Cf. United States v. Fernandez*, 127 F.3d 277, 286 (2d Cir. 1997); *United States v. Brechner*, 99 F.3d 96, 99-100 (2d Cir. 1996). Moreover, as the court itself noted when it granted the other witness a downward departure, the age, participation, etc. of Robert Alvarado and Maggiore were significantly dissimilar. Therefore, there is no showing of bad faith on the part of the government. *See United States v. Khan*, 920 F.2d 1100, 1105-06 (2d Cir. 1990). In any event, the district court made abundantly clear that it would not grant a sentencing departure no matter what the government did.

Maggiore further asserts that the district court should have recused itself because of its strong opinions as to Maggiore's lack of truthfulness. But the court's view was "formed by the judge on the basis of facts introduced or events occurring in the course of the ... proceedings" and therefore does "not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *United States v. Liteky*, 510 U.S. 540, 555-56 (1994). The district court judge did not abuse his discretion by declining to recuse himself on the basis of opinions he had formed over the course of the proceedings surrounding this shooting. *United States v. Conte*, 99 F.3d 60, 65 (2d Cir. 1996).

Maggiore makes an assortment of other related claims as well: (a) that he was wrongly denied the assistance of counsel at an interview during the Government's perjury investigation; (b) that the district court wrongly deprived him of a good faith hearing in connection with the Government's withdrawal of the 5K1 letter; and (c) that the use of jailhouse informants' statements to the Government without an opportunity for cross examination violated the Confrontation Clause as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004). But (a) he expressly waived, in his cooperation agreement, the assistance of counsel at such an interview, (b) the oral argument held at sentencing gave Maggiore all he was entitled to by way of a hearing, and (c) because the introduction of the jailhouse informant's statements was in part not for their truth, and, insofar as they were used for their truth, were unnecessary to establish Maggiore's breach, Maggiore's *Crawford* claim fails.

Maggiore also argues that his sentence violated his Sixth Amendment right to a jury determination of facts that affect his sentence. However, under 18 U.S.C. § 1959(1), a conviction of murder in aid of racketeering carries a mandatory sentence of life imprisonment. Thus, although the district court's factual findings resulted in a Guidelines sentence higher than what Maggiore would have received on the basis of the facts to which he allocuted at his plea, because that sentence is identical to what, pursuant to the statutory mandatory minimum, the district court would otherwise have been required to impose, any error is harmless. *See United States v. Sharpley*, ___ F.3d ___, Nos. 04-2934, 04-2935, 2005 WL 357449, at *3 (2d Cir. Feb. 16, 2005).

We have considered all of Maggiore's claims and find them to be without merit. For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of Court

by: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

- against -

EDWARD MAGGIORE,

Defendant.

----------X

UNITED STATES OF AMERICA

- against -

ALBERT ALVARADO,

Defendant.

----------X

UNITED STATES OF AMERICA

- against -

ROBERT ALVARADO,

Defendant.

----------X

FOR ONLINE PUBLICATION ONLY

MEMORANDUM AND ORDER

01 CR 915 (JG)

01 CR 1424 (S-1) (JG)

02 CR 541 (S-1) (JG)

APPEARANCES:

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JOHN GLEESON, United States District Judge:

Edward Maggiore, Albert Alvarado ("A. Alvarado"), and Robert Alvarado ("R. Alvarado") were accomplice witnesses for the government in the case *United States v. D'Angelo,* 02 CR 399 (JG). After hearing them testify, I concluded that they did not testify truthfully. All three defendants now face sentencing, and all three have moved for my recusal. For the reasons set forth below, the motions are denied.

BACKGROUND

The defendants' testimony at the *D'Angelo* trial was the principal focus of my decision granting Angel D'Angelo a new trial, *United States v. D'Angelo,* No. 02 CR 399, 2004 U.S. Dist. LEXIS 2239, at *46-97 (E.D.N.Y. Feb. 18, 2004), familiarity with which is assumed here. The following additional facts are relevant to the instant motions.

All three defendants signed cooperation agreements with the government. All three promised, among other things, to provide "truthful, complete and accurate information," including testimony. (Cooperation Agreements ¶ 3 ("Agreements").[1]) In exchange, the government promised, among other things, to file motions pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). These so-called "substantial assistance" motions provide a cooperating witness with the prospect of a sentence below the prescribed guideline range and any minimum sentence mandated by statute, respectively. But they do not guarantee such relief; as the cooperation agreements state explicitly, the motions merely "permit the Court, in its discretion," to impose a sentence below the guideline range and below any mandatory minimum sentence. (Agreements ¶ 6.)

All three defendants were aware of the fact that the government's substantial-assistance motions were necessary, but not sufficient, steps toward a lenient sentence. Trial Tr. at 268 (A. Alvarado), 384 (Maggiore), 536 (R. Alvarado), *D'Angelo* (No. 02 CR 399). Each knew that leniency required two events. First, the government had to conclude that the defendant had rendered substantial assistance and had otherwise complied with his obligations under the agreement, in which case it would file the required motion. Second, the judge had to find that a departure (or a sentence below an applicable mandatory minimum) was appropriate.

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[1] The paragraph citations to the cooperation agreements are to all three agreements unless otherwise specified.

In making that determination, the law expressly invites the sentencing court to consider, among other things, "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." U.S.S.G. § 5K1.1(a)(2).

On May 14, 2003, R. Alvarado first appeared before me for sentencing. I informed him and the government at that time of my belief that he, A. Alvarado, and Maggiore had testified falsely. The sentence was adjourned. In response to my finding of perjury, the government conducted its own investigation, and it too has concluded that all three witnesses committed perjury. As a result, the government has invoked its contractual power to withhold substantial assistance motions on behalf of A. Alvarado and Maggiore. R. Alvarado has received such a motion despite his false testimony.

DISCUSSION

The Alvarados and Maggiore argue that fairness requires my recusal from their cases. Because I have reached and expressed a conclusion about their credibility, they contend, they must be sentenced by another judge. As R. Alvarado puts it, my stated belief that he testified falsely "raises serious questions regarding the Court's ability to impartially consider the 5K1.1 motion submitted on Mr. Alvarado's behalf and to impose a fair sentence."

At bottom, the defendants' real dispute is not with the fact that I have evaluated their credibility, but rather with the outcome of the evaluation. If I had concluded that they had testified truthfully, and that their testimony had played a critical role in bringing a murderer to justice, I have no doubt that all three would welcome my proceeding to sentence them with that credibility

determination in mind. Indeed, as mentioned above, the governing guideline expressly states that I should evaluate the defendants' truthfulness.

However, after hearing their testimony, I did not believe them. Indeed, I believed at trial, and believe today, that each committed perjury in an effort to get credit at sentencing for helping to convict D'Angelo. The government now agrees with that assessment. While my conclusion will no doubt have a substantial negative impact on each defendant's sentence, it is no reason to recuse.

A. Alvarado makes the additional argument that my finding of perjury impairs my ability to fairly judge his motion for an order requiring the government to file a substantial assistance motion on his behalf. Since perjury is a crime, and the government may withhold the motion if the defendant commits a crime, A. Alvarado contends that I have "prejudged whether the prosecution has a legitimate basis for refusing to file the motion." (A. Alvarado's Mem. Law at 1.)

This argument has no merit. First, it proves too much. Judges are expressly *invited* by § 5K1.1 to evaluate the truthfulness of a cooperating defendant's testimony. U.S.S.G. § 5K1.1(a)(2). It would be odd indeed if an evaluation that is adverse to the defendant entitled the defendant to remove the judge, particularly where (as here) the prosecutor also concludes that perjury was committed.

My finding of perjury does not prejudge A. Alvarado's motion, in which he alleges that the government is acting in bad faith. A finding of perjury by me is not necessarily inconsistent with a finding that the prosecutor has acted in bad faith. It is true that

my evaluation of the defendants' credibility may *moot* the bad-faith motion (that is, I may determine that a departure would be unwarranted even if the substantial-assistance motion were made), but it does not prejudge it.

Given the facts underlying the recusal motions, application of the law is not difficult. A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," or "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a)-(b)(1). Motions for recusal are committed to my "sound discretion." *United States v. Conte*, 99 F.3d 60, 65 (2d Cir. 1996) (quotation marks omitted). "[A] favorable or unfavorable predisposition" may warrant recusal even where "it springs from the facts adduced or the events occurring at trial," but to do so it must be "so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also id.* at 554 ("The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias or prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice.").

The Supreme Court held in *Liteky* that

> judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost

> invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.

Id. at 555-56 (citation omitted); *see also United States v. Diaz*, 176 F.3d 52, 112 (2d Cir. 1999) (affirming denial of recusal motion where "the court's rulings were events that 'occurred in the course of judicial proceedings, *and* neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible'" (quoting *Liteky*, 510 U.S. at 556)); *Conte*, 99 F.3d at 65 ("Events occurring in the course of judicial proceedings generally do not constitute a basis for recusal unless they indicate that the judge has a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" (quoting *Liteky*, 510 U.S. at 555)). As an example of "such a high degree of favoritism or antagonism as to make fair judgment impossible," the Court favorably cited *Berger v. United States*, 255 U.S. 22, 28 (1921), which held that recusal was appropriate where the trial judge said, during a

World War I espionage case against German American defendants, "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans," as their "hearts are reeking with disloyalty." *Liteky,* 510 U.S. at 555.

The Court also wrote in *Liteky:*

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re J.P. Linahan, Inc.,* 138 F.2d 650, 654 ([2d Cir.] 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings.

Id. at 550-51.

Liteky is controlling here. As discussed above, U.S.S.G. § 5K1.1(a)(2) expressly invites me to evaluate the defendants' truthfulness in determining the appropriate departure. Indeed, it would have been a dereliction of my duty to the defendants, the government, and the public at large not to have carefully done so. "Bias or prejudice connotes an unfavorable opinion that is

somehow 'wrongful or inappropriate' because it is undeserved, rests on knowledge one ought not to possess, or is excessive." *Groden v. Random House, Inc.*, 61 F.3d 1045, 1053 (2d Cir. 1995) (quoting *Liteky*, 510 U.S. at 550). As my evaluation of the defendants' trial testimony is neither undeserved nor excessive, as shown by the government's investigation, and rests on knowledge I acquired in the course of properly discharging the obligations of my office, it is no basis for my recusal.

Finally, defendants rely on comments I made at the oral argument of D'Angelo's motion for a judgment of acquittal. At the conclusion of that oral argument, I stated, "I'm shaking up here. I feel sick with this case. This case reeks. You [i.e., the prosecutor] can defend this. You demonstrated you can defend this, but you don't have to. I can't for the life of me figure out why you are." Dec. 16, 2003 Hr'g Tr. at 46, *D'Angelo* (No. 02 CR 399). The Alvarados and Maggiore suggest that those comments evince strong personal feelings about them, warranting my recusal.

These suggestions are not persuasive. The quoted remarks, which occurred in *D'Angelo*, accurately reflected my disappointment with the government's determination to deny a new trial to a defendant whose conviction was obtained based on accomplice testimony that the government itself agreed was perjurious. That disappointment, and the reasons for it, are expressed at length in my sixty-page opinion granting D'Angelo's motions. Since I assume familiarity with that decision, I will not reiterate here the extensive factual underpinnings for the remarks now seized upon by the moving defendants. It suffices to say that the feelings they express were directed toward the government, which

has not moved for my recusal,[2] and therefore — as they express no bias or prejudice towards the defendants before me — are not grounds for recusal.

In sum, because my impartiality could not reasonably be questioned, and because the defendants have not shown "personal bias or prejudice concerning a party," 28 U.S.C. § 455(a)-(b)(1) — because I have no such bias or prejudice — the recusal motions are denied.

So Ordered.

/s/ John Gleeson
JOHN GLEESON, U.S.D.J.

Dated: April 8, 2004
Brooklyn, New York

[2] If it had, I would deny that motion as well. A judge's expressed disapproval, on fairness grounds, of the government's position in a criminal case would scarcely be a basis for recusal.

UNITED STATES DISTRICT COURT [1]
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	CR-01-915, CR-01-1424
-against-	United States Courthouse
EDWARD MAGGIORE, ALBERT ALVARADO,	Brooklyn, New York
Defendants.	April 8, 2004 2:00 o'clock p.m.

TRANSCRIPT OF MOTION-SENTENCE
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROSLYNN R. MAUSKOPF
United States Attorney
BY: PAMELA CHEN
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: GERALD DiCHIARA, ESQ.
For E. Maggiore.

LISA SCOLARI, ESQ.
For A. Alvarado.

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-260-2509

Proceedings recorded by mechanical stenography, transcript produced by CAT.

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they were smoking marijuana every day. They smoked marijuana before this incident and after this incident

THE COURT: I understand. Thank you.

The motion is denied for two reasons: It's both moot and meritless. It's not unimportant so I will address the merits in a moment. It is moot because I would not depart on the ground of substantial assistance even if a motion were made. It is meritless because the government has acted in good faith.

Paragraph 3 of the defendants' agreement with the Government require them to provide truthful, complete and accurate information, including testimony. The government promises in those agreements to make a substantial assistance motion, if it determines that the defendant has cooperated fully, provided substantial assistance and otherwise complied with the terms of the agreement.

As usual the government arrogates to itself the right to make a good faith determination, as to whether the defendant has complied with the terms of the agreement, and states here in its agreement with both defendants, that the offices' good faith assessment as to the completeness and accuracy of the cooperation shall be binding upon the defendant. The government also reserves the right to be released from an obligation to make a substantial assistance motion in the event it judges that the defendant has failed to

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The legal landscape is set forth -- it's not disputed here -- set forth in Rexach and Khan, where the explicit terms of an agreement, like these agreements, leaves the acceptance of a defendant's performance to the judgement of the prosecutor. The prosecutor can reject the defendant's performance provided she honestly is dissatisfied. That is paraphrasing from Rexach at page 713 of 896 F. 2d. It's a 1990 case.

In the decision to reject the defendant's performance and not to file the substantial assistance motion is reviewable only on a showing of prosecutorial bad faith. There is no bad faith here, to my mind, having been involved deeply in the facts of these cases, and all have different docket numbers, and all of their docket numbers are different from the DeAngelo case, but they are all part of the same case essentially, and in these cases the government can't fairly be challenged for improperly withholding 5k motions. If anything, the prosecutor in these cases have bent over, backwards for their witnesses.

A long time ago, the government had every reason to believe that Albert Alvarado had lied about material matters. Maggiore another government witness, whom the government told the jury should be believed, testified that Albert Alvarado

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threatened to kill him if he continued to implicate Albert Alvarado in the Palazzatto homicide. Maggiore

also put the lie to Albert Alvarado's testimony that

Albert Alvarado told police that there were four people in the car containing the murderers, some testified at trial. That was inconsistent with the government's case. If it were true it would have been a significant fact as the defense at the DeAngelo trial focused on the possibility of a fourth person in the car. Alvarado lied at trial when he testified about what he told the police, eleven days after the murder. The truth is he told Detective Hendricks that Maggiore, admitted being the shooter, the day after the murder. He lied about that at trial. He told the jury that Maggiore said DeAngelo killed Palazzatto.

I too was struck by this result of these polygraphs that were submitted in connection with these motions, because I see that Albert Alvarado failed when he answered, "yes", to the question: Were you told that LA shot that man?" I was surprised I hadn't been informed of that earlier. That's Albert Alvarado.

It's just as true long before the incident giving rise to the government's decision to withhold a substantial assistance motion for Maggiore, it had plenty of reasons to conclude that he lied as well about material matters.

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Some of these are recited in my lengthy decision in the DeAngelo case. I will just highlight a few here. Maggiore blamed Albert Alvarado for a year and a half for this murder. Suddenly stopped, according to him, because he was threatened by Albert Alvarado. The

government tells me that from the very outset of his cooperation, it was concerned that Maggiore claimed not to recall who took the murder weapon from beneath the hood of the car right before it was used to kill Palazzatto.

Obviously, that is a fact, I disagree with Mr. DiChiara. Obviously, that is a fact that matters a lot. Sort of thing that one would recall. You are about to commit a murder, who got the gun? The government was concerned about that from the start. It had plenty of reason to be concerned about that before the trial even. Three of these fellow inmates of Maggiore came forward and said that what he told the government, that he was lying even before he testified at the DeAngelo trial.

Jose Sanderlinder, wrote to Ms. Chen, back in August of 2002, stating that according to Maggiore, Maggiore popped the hood of the car and retrieved the gun. Americo Massa wrote shortly before the trial, I think, there is no date on the letter, but has the date on it of March 18, 2003, "Maggiore was driving, he opened the hood from the inside, released it, got out and got the gun." Maggiore plead guilty

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to depraved indifference homicide. He used the phrase reckless disregard of the risk that Palazzatto would be shot. But then, as he was prepared for trial, because I assume he testified consistent with what he said during his trial preparation sessions, his story morphed into being shocked, surprised that Palazzatto was shot, wasn't supposed to happen he testified. He was stunned. How that can be squared with the sworn statement to me when he plead guilty that he exercised depraved indifference to human life, to Palazzatto's life, is beyond

me. I will stop there, but as near as I can tell the government was willing to overlook all of those lies and more.

These defendants had quite an ally in the prosecutor. But then after I informed the government that I thought its witnesses were liars, to its credit, I mean that, I've been hard on the government because much is expected of the government. It's not an ordinary advocate. It has to answer to a higher calling.

Counsel over here on my left are obligated to zealously advocate the individual interests of their clients'. They have done so. They have done so well under difficult circumstances.

The government isn't so situated. Its job is to do justice and I have been hard on the government. I give it credit now for conducting a thorough investigation in good

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faith and uncovering more perjury that it has decided in good faith cannot be overlooked.

I reject out of hand any notion that the fact that Ms. Chen showed a good heart in filing a 5k, a substantial assistance motion, for Robert Alvarado, ought to inform or indicate bad faith in connection with her decision with these two defendants.

On its face those are contradictory propositions that someone has a good heart is, therefore, acting in bad faith with others. But on a more lawyerly level what a material incentive that would be, disincentive it would be for the government to exercise some compassion, if

it felt as though it had to deny substantial assistance motions to everyone as to whom it could be denied on pain of being found in bad faith for denying it in cases like this, then the Robert Alvarado's of the world would be stuck, the government would be forced not to exercise some judgment and compassion.

I reject that argument. The government writes in its letter to me in connection with Albert Alvarado motion: "There can be no more fundamental breach than lying about oneself in the crime the defendant is cooperating, especially when this crime is murder. Such a breach clearly justifies the government's decision to withhold a 5K1.1 letter."

Now, in fairness to Albert Alvarado I acknowledge that the government has not always had that view. A couple of

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months ago, when they were trying to uphold a conviction based on that same exact testimony, it characterized it as collateral and not material and cumulative. Citations to those characterizations are set forth on page 47 of my memorandum and order granting the motion in the DeAngelo case. It's hard to reconcile those statements, but I have no doubt that now they have gotten it right, these are fundamental breaches. There can be no more fundamental breach than lying about ones role in the murder. Is this good faith? Of course, all you need to do is canvas the cases, you look at the mini misstep, the minuscule microscopic misstep in a case like Brechner, that justified the prosecutor's withholding a substantial assistance motion, and this is -- these are lies -- these are missteps of a fundamentally different magnitude. Of course, it's good faith.

To the extent that the motions are based on Meany they are just meritless. Paragraph five of the agreements, which was predicted by Ming He itself, by the Second Circuit in Ming He, waives the right. If I were writing I would put that phrase, that word in quotations, waives the right conferred by Ming He as the Second Circuit predicted would happen.

There is some dispute about Ms. Scolari not being present for the polygraph, the questioning after the polygraph, that Albert Alvarado failed. I really don't need

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to resolve that. Robert Alvarado gave up the existence of this conversation that occurred right before the homicide, so did Maggiore. He still does sort of. He says a 75-percent chance this critical conversation occurred that would have altered the character of the entire case in which they testified. If I had to resolve the dispute about Ms. Scolari's absence in the post polygraph questioning, I would resolve it against Albert Alvarado. I would conclude that it was fairly a part of the polygraph itself that she chose not to be present for. I would also conclude it was embraced by the waiver in paragraph five.

I will add this respectfully, with respect to the Ming He part of this motion. That case is premised on the notion had a cooperator needs protection from AUSA's. Lawyers ought to be there to protect accomplice witnesses from their adversary, the assistant.

There is no question that Maggiore and Albert Alvarado were meeting with an adversary, when they met with Ms. Chen and her agents and other AUSA's. But I

will suggest here, as I have elsewhere, focusing on protecting the accomplice witness shouldn't result in a loss of sight of the interest of another set of defendants, the ones against whom those accomplices may eventually testify.

In theory it's true: Cooperating defendants have a lot to worry about in their dealings with AUSA's. In the real

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world, they don't have enough to worry about. The relationship, if anything, makes prosecutors all to willing to forgive their witnesses when they lie, even though these defendants are making this motion and have been depraved of a substantial assistance motion. Hardly anything could prove the point better than the fact that Robert Alvarado still has his substantial assistance motion pending on his behalf.

There is an echo, not an explicit argument, but an intimation in the moving papers that a sufficient response to the government's position was precluded by the timing of these motions and this hearing. I reject that. A full eleven months ago I expressed my view that the accomplices in this case had lied.

On February 18th of this year I issued the DeAngelo decision, which in no uncertain terms expresses the same view. The sentence for Robert Alvarado was scheduled for February 27th. I received a couple of motions to adjourn it that had no explanation.

For example, in Ms. Chen's February 24th letter she asks for more time in a one paragraph letter, didn't say why I denied it.

I finally got a letter from Mr. DiChiara dated February 24th, that explained to me why the adjournment was needed. Said he wasn't fully informed of the government's investigation, they still might file a 5k.

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I put the motion over to March 12th. Just before that date Ms. Scolari informed me that she intended to make the motions that have been decided here this afternoon. I put it over again until today. There has not been a shortage of time. I understand the reluctance of counsel to proceed to sentence in the current state of affairs, but I have no doubt they have had ample opportunity to marshal the facts, make their arguments. I reject the motions.

The marshals please take Mr. Maggiore back. We will proceed to sentencing on Albert Alvarado.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 22nd day of July, two thousand five.

UNITED STATES COURT OF APPEALS
FILED
JUL 22 2005
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Present:

Hon. Dennis Jacobs,

Hon. Guido Calabresi,

Hon. Rosemary S. Pooler,

CIRCUIT JUDGES.

USA v. Maggiore, 04-2767-cr

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Edward Maggiore. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney